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Tan Pui Sim v Tan Chong Ton @ Tan Boon Seng

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HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22-1300 OF 2010
SEE MEE CHUN JC
7 OCTOBER 2013

C

Contract — Sale and purchase of land — Validity — Sale of land done through power of attorney ('PA') — Vendor subsequently challenging PA on the ground that vendor lacked capacity to enter into the PA — Whether vendor can rely on his own failure to comply with s 60(4) of the Probate and Administration Act 1959 — Purchaser seeking to enforce PA — Unauthorised amendments made to PA — Purchase price not paid to vendor — Whether there was valid sale and purchase transaction

D

Succession — Administration — Sale of land — Formal sanction of court — Whether disposal of property without sanction of court voidable at the instance of disposer — Sale only voidable if lack of sanction challenged by some other interested party — Probate and Administration Act 1959 s 60(4) & (6)

E

The plaintiff sought to enforce a power of attorney ('the PA') in which the defendant was alleged to have sold a share in a piece of land to the plaintiff at a price of RM1,605,590. The defendant challenged the validity of the PA on the ground that the defendant lacked the capacity to enter into the PA as he was not an administrator and was at best a personal representative such that s 60(4) of the Probate and Administration Act 1959 ('the Act') had not been complied with. The crucial issue was whether the PA was in fact a sale and purchase of the land to plaintiff and whether the defendant had received the money which the plaintiff's late husband was said to have paid to the defendant upon the signing of the PA. Paragraph 23 of the PA provided that the donee had paid to the donor a sum of RM1,605,590 and para 24 of the PA provided that the donee was entitled to act as the ultimate owner of the whole potion of the land. PW2 (the lawyer who prepared the PA) testified that when he signed the PA paras 23 and 24 were not in and were not inserted by him. PW2 also disagreed that the plaintiff's late husband had brought cash and handed it to the defendant in his presence.

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Held, dismissing the plaintiff's claim with costs:

(1) Section 60(4) of the Act requires the court's permission in the transfer of property or lease exceeding five years. Section 60(6) of the Act which deals with the effect of contravention provides the disposal of property in

contravention of s 60 shall be voidable at the instance of any other person interested in the property. This requires a challenge to the PA to be made by 'any other person interested in the property' for which there was none. Therefore, the defendant had the capacity to enter into the PA which purported to dispose of the land (see para 2).

(2) It was probable that paras 23 and 24 were not in the PA when it was signed by the defendant and PW2. Further as the money was not paid, this made it probable that the two paragraphs were not in the PA when first signed by the defendant and PW2. An important amendment such as the insertion of the two paragraphs would necessarily have required an initial and there was none (see para 15).

(3) The plaintiff had no receipt to show payment but claimed that the proof of payment was the PA itself and the deposit of the grant with PW2. The plaintiff had also stated that the money was paid in PW2's presence which was denied by PW2. It was probable the money had not been paid and further since it was probable the two paragraphs were inserted after the signing, such reliance was not tenable. On the facts of the case no sale and purchase had been proved (see paras 23–24).

[Bahasa Malaysia summary

Plaintif memohon untuk menguat kuasa surat kuasa wakil ('PA') di mana defendan didakwa menjual syer dalam sebidang tanah kepada plaintif pada harga RM1,605,590. Defendan mencabar keesahan PA tersebut atas alasan bahawa defendan tidak mempunyai kapasiti untuk memasuki PA memandangkan dia bukan pentadbir dan bukan wakil persendirian dengan itu s 60(4) Akta Probet dan Pentadbiran 1959 ('Akta') tidak dipatuhi. Isu penting adalah sama ada PA tersebut sebenarnya adalah jual beli tanah tersebut kepada plaintif dan sama ada defendan menerima wang yang mana mendiang suami plaintif dikatakan membayar kepada defendan selepas menandatangani PA tersebut. Perenggan 23 PA tersebut memperuntukkan bahawa penerima telah membayar kepada penderma sejumlah RM1,605,590 dan perenggan 24 PA tersebut memperuntukkan bahawa penerima berhak untuk bertindak sebagai pemilik terakhir keseluruhan bahagian tanah tersebut. PW2 (peguam yang menyediakan PA tersebut) memberi keterangan bahawa semasa dia menandatangani PA tersebut perenggan 23 dan 24 tidak ada dan tidak dimasukkan olehnya. PW2 juga tidak bersetuju bahawa mendiang suami plaintif telah membawa wang tunai dan menyerahkan kepada defendan dalam kehadirannya.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Seksyen 60(4) Akta memerlukan izin mahkamah dalam pemindahan hartanah atau pajakan yang melebihi lima tahun. Seksyen 60(6) Akta yang menangani kesan perlanggaran memperuntukkan jualan hartanah

dalam pelanggaran s 60 boleh batal pada masa mana-mana orang lain yang berminat dalam hartanah tersebut. Ini memerlukan cabaran kepada PA untuk dibuat oleh 'any other person interested in the property' yang mana tidak ada. Oleh itu, defendan mempunyai kapasiti untuk memasuki PA yang mana untuk menjual tanah tersebut (lihat perenggan 2).

(2) Adalah kemungkinan bahawa perenggan 23 dan 24 tiada dalam PA apabila ia ditandatangani oleh defendan dan PW2. Selanjutnya memandangkan wang tidak dibayar, ini membuatkannya berkemungkinan bahawa kedua-dua perenggan tersebut tiada dalam PA apabila ditandatangani pada mulanya oleh defendan dan PW2. Pindaan yang penting seperti penyisipan kedua-dua perenggan semestinya memerlukan tandatangan dan tandatangan itu tidak ada (lihat perenggan 15).

(3) Plaintif tidak mempunyai resit untuk menunjukkan bayaran tetapi mendakwa bukti bayaran adalah PA itu sendiri dan deposit pemberian tersebut berada dengan PW2. Plaintif juga menyatakan bahawa wang dibayar dalam kehadiran PW2 yang mana dinafikan oleh PW2. Kemungkinan wang tersebut tidak dibayar dan selanjutnya memandangkan ia adalah berkemungkinan kedua-dua perenggan tersebut dimasukkan selepas tandatangan, pergantungan sedemikian tidak dapat dipertahankan. Atas fakta kes tiada jualan dan pembelian telah dibuktikan (lihat perenggan 23–24).]

Notes

For cases on sale of land, see 11 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2206–2234.

Cases referred to

Chee Hock Lai v Tan Swee Thai & Ors [1990] 3 MLJ 477, HC (refd)
Guan Teik Shd Bhd v Haji Mohd Noor bin Haji Yakob & Ors [2000] 4 MLJ 433, CA (folld)
Mohamed Moidu bin Mohamed & Anor v Hassan bin Kadir & Ors [2001] 4 MLJ 292, HC (distd)
Pernas Trading Sdn Bhd v Persatuan Peladang Bakti Melaka [1979] 2 MLJ 124, FC (folld)

Legislation referred to

Evidence Act 1950 s 154
Power of Attorney Act 1949
Probate and Administration Act 1959 ss 60, 60(4), (6), 71

Ramanathan Vellu (Rama Velu & Associates) for the plaintiff.
Veerapan Supermaniam (Veera & Co) for the defendant.

See Mee Chun JC:

[1] The plaintiff seeks to enforce a power of attorney dated 3 April 2001 (PA, B 1–4) in which the defendant is alleged to have sold a 1/2 share of land ('the land') to the plaintiff for the sale and purchase price of RM1,605,590 ('the money').

CAPACITY OF THE DEFENDANT TO SIGN PA

[2] The defendant had challenged the validity of the PA on the ground the defendant lacked the capacity to enter into the PA as he was not an administrator and was at best a personal representative such that s 60(4) of the Probate and Administration Act 1959 ('the Act') had not been complied with. This provision requires the court's permission in the transfer of property or lease exceeding five years. Section 60(6) which deals with the effect of contravention provides the disposal of property in contravention of s 60 shall be voidable at the instance of any other person interested in the property. This requires a challenge to the PA to be made by 'any other person interested in the property' for which there was none. In any event if there was such a challenge to the defendant's action it was held in *Chee Hock Lai v Tan Swee Thai & Ors* [1990] 3 MLJ 477 where it was stated at p 481 the provisions of ss 60 and 71 of the Act:

> clearly state that where an administrator of an estate takes action without getting the approval of the court, the said action does not become null and void on the application of any party who has an interest in the property.

Therefore the defendant had the capacity to enter into the PA which purports to dispose of the land.

ISSUE

[3] The issue at hand is whether the PA was in fact a sale and purchase of the land to the plaintiff and whether the defendant had received the money which the plaintiff's late husband is said to have paid the defendant upon the signing of the PA. In the PA it is stated the defendant as the 'beneficial power and administrator of the estate of Tan Seng Hong (deceased)' 'nominates and appoints' the plaintiff 'to be his attorney to do all or any of the following things' in respect of the land. Paragraphs 23 and 24 of the PA (to be collectively referred to as 'the two paragraphs') then provides:

23. That this Power of Attorney is at any point of time will become irrevocable and in consideration of the same the Donee had paid to the Donor a sum of RM1,605,590.00 only and simultaneously may render any Power of Attorney given prior to this recent Power of Attorney become null and void and of no further effect.

24. That the Donee of the Power of Attorney shall be entitled to secure any available rights and interest and thus to act as the ultimate owner of the whole potion of the land.

EVIDENCE

[4] It was the plaintiff's evidence as PW1 the land had been sold to her pursuant to the PA. It had been prepared by the defendant's lawyer who had explained the contents to the defendant. She, her late husband and the defendant's lawyer were present when the defendant signed. In cross-examination she said she was the nominee and not donee and the PA was because her late husband had paid to the defendant and had purchased the land. In re-examination she explained her answer of nominee was due to the words 'do hereby nominate and appoint' and she doesn't understand the meaning of nominee nor the words 'to be my attorney'. This is because the PA is in English. The plaintiff's evidence on payment of the money will be elaborated under the heading 'Finding'.

[5] PW2 (Pathmanathan Nalliannen) was the lawyer who prepared the PA. It is not disputed he has since been convicted of murder and sentenced to death. In examination-in-chief when asked if he knew the plaintiff and the defendant he said he knew them but had to refer to his files. All his files including that relating to the plaintiff and the defendant had been seized by the police. He stated he prepared the PA and signed it. In cl 23 donee referred to the plaintiff and donor to the defendant. The PA was prepared upon the instructions of the plaintiff's late husband and the defendant. When he signed the PA paras 23 and 24 were not in and were not inserted by him. He was asked to compare the aforesaid paragraphs which were typewritten with that of other typewritten provisions and asked if it was of typewriting and his answer was not sure. When it was put to him they were the same, he disagreed. No amount of money had been paid. He disagreed he had prepared a document (ie the PA) which contradicts his client's instructions. He had prepared other documents but could not remember what they were. As to whether the grant and Form 14A had been handed to him that day he replied he was not sure. He disagreed the plaintiff late husband had brought cash and handed to the defendant in his presence. As to whether he had charged fees he replied he had to refer to his file. He disagreed he had a selective memory.

[6] In cross-examination he said the two paragraphs were not in the PA when he witnessed the signing. There was no initial there and he stated an

amendment required an initial. The PA was signed in his office and no money was paid. To a further question by the plaintiff counsel PW2 said the PA had been registered in the High Court. To a question from the defendant counsel he said his office had registered it.

[7] The defendant as DW1 in his witness statement WSD1 said in the process of applying to be the sole administrator he signed various documents one of which 'saya diberitahu bahawa saya telah menandatangani surat wakil kuasa tersebut'. Although he signed the PA he did not understand the contents as it was in English. He did not sell the land and neither did he receive any money. In cross-examination he said he signed 'kertas putih untuk kuasa bapa' and disagreed he instructed the lawyer to prepare the PA. He denied the money had been paid in cash by the plaintiff's late husband. He disagreed when referred to para 23 he received the money and that was why he signed the PA. In re-examination he stated when he signed the PA 'ada kosong ada tiap. Masa saya sign ada tulisan tetapi tidak faham'.

FINDING

[8] From the PA the plaintiff is stated to be donee and the defendant the donor and this would be the meaning although the laintiff stated she was nominee and not donee. The plaintiff had explained why she stated so as she had been referring to the words 'nominate and appoint'.

[9] As it stands para 24 of the PA is capable of being construed as a term of a sale and purchase of land as evident by the words 'shall be entitled to secure any available rights and interest and thus to act as the ultimate owner of the whole portion of the land'. However it remains to be seen whether the two paragraphs were in the PA as signed by the defendant and witnessed by PW2 and whether there had been payment of the money by the plaintiff's late husband.

[10] I shall firstly consider whether there had been a payment of the money as it has a bearing on when the two paragraphs were in the PA. In para 9 of her witness statement WSP1 the plaintiff says the money was paid by her late husband by cheque and in Q&A 10:

> Qn 'Adakah kamu memiliki sesalinan cek tersebut dan atau apa-apa bukti bayaran?'
>
> Ans 'Tidak, semuanya berada dengan suami saya, yang kini sudah meninggal dunia dan juga berada dalam fail bekas peguam Defendan tersebut. Saya percaya suami telah bayar secara tunai di hadapan peguam Defendan'.

[11] Thus within the plaintiff's own witness statement there is a contradiction as to the mode of payment. In cross-examination she stated it was paid in cash.

[12] The plaintiff was referred to B1 10–11 which is her lawyer's letter dated 13 July 2011 to the defendant's lawyer where it is stated payment was by cheque. To a question as to why it was so stated she replied it was her lawyer's mistake.

[13] The plaintiff was also referred to a caveat lodged by her and the reasons for caveat in B p 18 in which is stated 'saya telahpun membayar wang pendahuluan'. She stated it had been paid in full and this had been prepared by another lawyer Chia & Co and it was a mistake. In re-examination she was referred to a subsequent caveat and the reasons in B 15 where she withdrew the first caveat and as the land is to be disposed to a third party she now enters a fresh caveat.

[14] Hence the plaintiff's own evidence shows inconsistency as to how the money had been paid whether in cash, cheque or even part payment. If the money had been paid in cash this court finds it difficult to accept the fact that such a huge sum of RM1,605,590 could indeed be paid in cash. If indeed it was paid in cash and was the full payment the question arises as to how the plaintiff could have said in her first application for caveat she had made a part payment other than to say it was a mistake. If indeed it was paid in cash the question arises as to how the plaintiff could have said payment had been by cheque in her lawyer's reply dated 13 July 2010 other than to say it was her lawyer's mistake. As to the reason for caveat being payment in part and her application to remove that caveat the reference to 'membayar wang pendahulaun' still remained. The many inconsistencies and contradictions in the plaintiff's evidence on how the money was paid makes it probable it was not paid. That would make the defendant's denial of receiving the money, and PW2's evidence the money had not been paid in his presence, probable.

[15] It was the evidence of PW2 the two paragraphs were not in the PA when he signed as witness. Although the plaintiff counsel had sought to discredit the evidence of PW2 one part of his evidence which I accept was the two paragraphs had not been initialed and any amendment required an initial. That being the case it is probable the two paragraphs were not in the PA when signed by the defendant and PW2. Further as the money was not paid this makes it probable the two paragraphs were not in the PA when first signed by the defendant and PW2. There was another amendment which had not been initialed. This related to the description of parties and the land. This is not as critical an amendment as the insertion of the two paragraphs whereby such an important amendment would necessarily have required an initial.

[16] The plaintiff agreed she had no receipt to show payment but the proof of payment was the PA itself and the deposit of the grant with PW2. The plaintiff had also stated the money was paid in PW2's presence which was denied by PW2.

[17] To support the fact the money had been paid reliance was made to para 23 of PA and the words 'had paid'. For the reasons given earlier it is probable the money had not been paid and further since it is probable the two paragraphs were inserted after the signing such reliance is not tenable.

[18] As to the defendant having deposited the original title grant with the defendant's lawyer as proof of him having been paid the money, the defendant's evidence that he did so for the purpose of application for administration of his father's estate is probable.

[19] The plaintiff's counsel had sought to portray PW2 who was his own witness as a murderer lacking credibility with confusing and contradictory evidence and a selective memory. The contradiction was in relation to the PA which had the words 'had paid' but PW2 had stated no money had been paid and when asked to compare the typing in B 21 (also to be found in B 1) with that in B 24 (also to be found in B 3) he said he didn't bring his glasses and yet when referred to B 21/B 1 he required glasses but not when it came to B 24/B 3. The selective memory was having to refer to files when asked if he had charged fees and yet he was able to remember there was no money paid by the plaintiff's late husband to the defendant.

[20] The defendant's counsel in turn submitted the plaintiff's counsel ought not to have questioned PW2 by a series of 'put it to you' questions which amounted to cross-examination and inadmissible in law. Section 154 of the Evidence Act 1950 was referred to. It was thus submitted parts of the evidence where PW2 was cross-examined by the plaintiff's counsel had to be expunged and rendered inadmissible. This meant PW2 evidence there was no money paid and the two paragraphs were inserted by someone else had to be accepted as the plaintiff's case.

[21] Section 154 states 'The court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross examination by the adverse party'. When PW2 was being questioned by the plaintiff's counsel s 154 was never raised by the defendant's counsel although a legal issue can be brought up at any time including during submissions. The court did not have an opportunity to allow or disallow such questioning and hence it is now difficult to say which part of PW2 evidence ought to be

admitted or otherwise. However as stated earlier I accepted that part of PW2 evidence that amendments have to be initialed and that no money had been paid in his presence.

[22] The plaintiff had referred to *Guan Teik Shd Bhd v Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 MLJ 433 and *Pernas Trading Sdn Bhd v Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124. In *Guan Teik Shd Bhd* it was held:

> In cases where conflicting evidence are presented before a court it is the duty of the court not only to weigh such evidence on a balance of probabilities but it is also incumbent upon the court to look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact. ….

In *Pernas Trading Sdn Bhd* it was stated 'the respondents should not be allowed to bring oral evidence to contradict the terms of the contract …'.

[23] This court is not departing from the principles laid down in *Guan Teik Shd Bhd* and *Pernas Trading Sdn Bhd*. In this instant case the contemporaneous document in the form of the PA does not support a sale and purchase and further no money had been paid. Neither has oral evidence been accepted to contradict the PA as the two paragraphs which are the bone of contention were not in the PA as signed by the defendant and PW2.

[24] The plaintiff had also relied on *Mohamed Moidu bin Mohamed & Anor v Hassan bin Kadir & Ors* [2001] 4 MLJ 292 where a deed of sale was said to have satisfied the requirements of Power of Attorney Act 1949 and was held to be 'an out and out agreement for the sale of land' (p 299). As stated earlier para 24 of the PA is capable of being construed as a term for the sale and purchase of land. However on the facts of this case no sale and purchase has been proved.

CONCLUSION

[25] For the reasons given above the plaintiff's claim is dismissed with costs.

Plaintiff's claim dismissed with costs.

Reported by Kanesh Sundrum